WC 11-118

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Petition for Declaratory Ruling To Clarify 47 U.S.C. § 572 in the Context of Transactions between Competitive Local Exchange Carriers and Cable Operators	)	Docket No. ____

PETITION FOR DECLARATORY RULING

Rick Chessen
Neal M. Goldberg
Steven F. Morris
National Cable & Telecommunications Association
25 Massachusetts Avenue, N.W. – Suite 100
Washington, D.C. 20001-1431
(202) 222-2445

June 21, 2011

TABLE OF CONTENTS

Page

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling To Clarify 47 U.S.C. § 572 in the Context of Transactions between Competitive Local Exchange Carriers and Cable Operators	)	Docket No. ____
	)	

PETITION FOR DECLARATORY RULING

Pursuant to Section 1.2 of the Commission's rules,[1] the National Cable & Telecommunications Association ("NCTA")[2] respectfully requests that the Commission issue a declaratory ruling clarifying that Section 652 of the Communications Act of 1934, as amended (the "Act"), does not apply to transactions between cable operators and competitive local exchange carriers ("CLECs").

The Telecommunications Act of 1996 ("1996 Act") sought to promote competition for local telephone services by imposing a series of market-opening obligations on incumbent LECs, including the regional Bells, in an effort to mitigate their structural advantages.[3] Consistent with the 1996 Act's goal of promoting competition among formerly disparate industry segments,

---

1 47 C.F.R. § 1.2; 5 U.S.C. § 554(e).

2 NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest provider of broadband service after investing over $170 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 23 million customers.

3 *See* 47 U.S.C. §§ 251, 271; *see generally* THE TELECOMMUNICATIONS ACT OF 1996: LAW & LEGISLATIVE HISTORY 19-20 (Robert E. Emeritz et al., eds., Pike & Fischer 2001); *see also* H.R. Rep. No. 103-560 (1994) (advocating the lifting of cable-telephone cross-ownership rules).

Congress enacted Section 652 to impose cross-ownership restrictions on cable operators and LECs unless the parties obtain a waiver from the Commission and the approval of each local franchising authority ("LFA").[4] By barring cross-ownership absent a waiver, the statute effectively creates a presumption that proposed acquisitions of cable companies by LECs, or vice versa, are unlawful.

The text, purpose, and history of Section 652 indicate that it was intended to prevent the two then-dominant incumbent service providers in each local area—incumbent LECs, which owned the telephone lines, and cable operators, which owned the cable lines—from merging or acquiring certain financial interests or management stakes in each other such that a single company would control both wires to a customer's home or office. Transactions between cable operators and *competitive* LECs do not implicate these concerns—to the contrary, they are almost always strongly pro-competitive—because CLECs seldom control "last mile" facilities to a customer's home or office and where they do, the incumbent LEC continues to control its own wire. Historically, the Commission appears to have assumed that Section 652 does not apply to CLEC-cable transactions. Nevertheless, the Commission's handling of a recent transaction between Comcast and CIMCO, a Chicago-based CLEC, implicitly suggests that Section 652 may in fact apply.[5] In that transaction, after Comcast and CIMCO raised a question regarding the proper scope of Section 652(b), the Commission at the request of the parties declined to address

---

4 47 U.S.C. § 572(d)(6)(B).

5 *See Applications Filed for the Acquisition of Certain Assets of CIMCO Communications, Inc. by Comcast Phone LLC, Comcast Phone of Michigan, LLC and Comcast Business Communications, LLC*, Memorandum Opinion and Order and Order on Reconsideration, 25 FCC Rcd 3401 ¶ 13 n. 34 (2010) ("Comcast-CIMCO Order"). The application proposed to allow Comcast to acquire CIMCO, a regional CLEC that provides telecommunications services exclusively to business and enterprise customers in a limited number of markets, primarily in Illinois and Michigan.

whether Section 652 applies to CLEC-cable transactions in which the CLEC was not providing service as of January 1, 1993, and thus introduced significant uncertainty.[6]

Uncertainty over Section 652's reach is exacerbated by a waiver process that allows LFAs to hold up even pro-competitive transactions for any reason—or for no reason at all—on a timetable of their choosing. The prospect that pro-competitive combinations would be burdened with a presumption of illegality and required to navigate a potentially endless LFA approval process creates a powerful disincentive to pursuing or entering into these transactions, and thus deprives consumers of the resultant benefits.

---

6 Following the Comcast-CIMCO Order, another set of parties, One Communications, FiberNet, and NTELOS, filed an application seeking a waiver of Section 652(b), apparently on the assumption that Section 652(b) applied where the acquirer of CLEC assets held attributable interests in overlapping cable systems. Specifically, the parties explained that Quadrangle Group held interests in both NTELOS (an incumbent LEC with adjacent CLEC operations) and Suddenlink (a cable operator with some franchise areas that apparently overlap with NTELOS operations), and NTELOS was acquiring CLEC assets controlled by FiberNet. In granting the requested waiver, the Wireline Competition Bureau stated that "Section 652(b) is applicable to this transaction because of Quadrangle's holdings in both NTELOS and Suddenlink." Public Notice, *Applications Granted for the Transfer of Control of FiberNet from One Communications Corp. to NTELOS Inc.*, WC Docket No. 10-158, at 2 (rel. Nov. 29, 2010); *see also* Public Notice, *Applications Filed for the Transfer of Control of FiberNet From One Communications Corp. to NTELOS Inc.*, WC Docket No. 10-158, at 4 (rel. Sep. 16, 2010). It is unclear exactly what overlap the Bureau believed to trigger Section 652(b), given that NTELOS owns both ILEC and CLEC assets in the states served by Suddenlink. *See* FiberNet Initial PN at 2-3 (detailing NTELOS's ILEC and CLEC assets in Virginia and West Virginia, states in which Suddenlink also provides cable services). To the extent that the Bureau was referring to NTELOS's *ILEC* operations, then it seems clear that Quadrangle's control of overlapping ILEC and cable interests implicated the statute. But if the Bureau meant to suggest that NTELOS's *CLEC* operations overlapped with Suddenlink's franchise areas and therefore implicated Section 652(b), it is unclear why Quadrangle did not require a waiver when the NTELOS-Suddenlink overlap first arose, as opposed to requiring one in connection with a subsequent transaction that did not create the NTELOS-Suddenlink overlap at all. In any event, NCTA does not believe that the Bureau should have required a waiver of Section 652(b) based on any CLEC-cable overlap, and a Bureau-level Public Notice is insufficient to establish such a requirement, particularly in light of the confusion as to what the Bureau regarded as the triggering event.

The problems created by the Commission's failure to clarify Section 652's reach have become particularly acute. Many CLECs are struggling to raise capital. CLEC-cable combinations provide a unique opportunity to mount an effective challenge to incumbent LECs, which maintain a dominant position in serving business customers, the principal customer segment served by CLECs, in most areas. But Section 652 has emerged as a potentially insurmountable and wholly unjustified hurdle to cable acquisitions of CLECs, untethered from its purpose. To remove this unnecessary barrier to transactions that do not implicate the concerns underlying Section 652, the Commission should issue a declaratory ruling clarifying that Section 652 does not restrict transactions between CLECs and cable operators. The fact that the hurdles associated with an expansive construction of Section 652 could prevent such a transaction, together with the likelihood that resolving this interpretive question in the context of a particular transfer-of-control application would cause undue delay, warrants declaratory relief in advance of any particular transaction.

Alternatively, NCTA has filed concurrently a Conditional Petition for Forbearance requesting that, if the Commission finds Section 652 applicable to CLEC-cable transactions, it forbear from enforcing Section 652 in its entirety in the context of CLEC-cable transactions, or at least forbear from enforcing the LFA approval requirement in such circumstances.

Finally, if the Commission were to deem Section 652 to restrict transactions between CLECs and cable operators *and* deny the Conditional Petition for Forbearance, NCTA requests that the Commission establish substantive standards and time limits to facilitate expeditious consideration of waiver requests, including standards that apply to LFAs. The Commission's action on these requests is essential to provide clarity and fulfill the vision of the 1996 Act by enabling pro-competitive transactions between CLECs and cable operators to proceed without facing artificial and unjustified regulatory barriers.

I. THE COMMISSION SHOULD CLARIFY THAT SECTION 652 DOES NOT APPLY TO TRANSACTIONS BETWEEN CLECS AND CABLE OPERATORS

The Commission should issue a declaratory ruling clarifying the scope of Section 652 because the statute's ambiguity will deter efficient and pro-competitive transactions between CLECs and cable operators and deprive the public of the resulting benefits. The Administrative Procedure Act and the Commission's rules confer broad discretion to issue a declaratory ruling to "terminat[e] a controversy or remov[e] uncertainty."[7] The Commission has used the declaratory ruling process to clarify ambiguous provisions in the Act,[8] and it has noted that declaratory rulings are "helpful to avoid future disputes" where the precise meaning of the statute is uncertain.[9] Similarly, scholars have noted that declaratory rulings constitute efficient tools for an agency to define the scope of statutes and regulations[10] and help to "prevent[] the chilling of lawful conduct" by regulated entities.[11] All of those purposes would be served here, as the present uncertainty concerning the applicability of Section 652 to transactions involving CLECs is chilling pro-competitive transactions and thus diminishing consumer welfare. Indeed, the

---

7 5 U.S.C. § 554(e); 47 C.F.R. § 1.2; *see also, e.g.*, *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007).

8 *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, Declaratory Ruling, 24 FCC Rcd 13994 ¶ 23 (2009).

9 *See, e.g.*, *Network Affiliated Stations Alliance Petition for Inquiry into Network Practices and Motion for Declaratory Ruling*, Declaratory Ruling, 23 FCC Rcd 13610 ¶ 5 (2008).

10 *See, e.g.*, Jeffrey S. Lubbers & Blake D. Morant, *A Reexamination of Federal Agency Use of Declaratory Orders*, 56 ADMIN. L. REV. 1097, 1123 (2004).

11 Burnele V. Powell, *Administratively Declaring Order: Some Practical Applications of the Administrative Procedure Act's Declaratory Order Process*, 64 N.C. L. REV. 277, 283 (1986).

prospect that such transactions will be presumed unlawful and approved only if (1) the Commission grants a waiver, and (2) *all* implicated LFAs consent, creates a potentially insurmountable barrier to efficient business combinations that would not remotely threaten any public interest harm.

A. The Text of Section 652, Read in Light of Its Purpose, Confirms Congress's Intent To Prevent Incumbent Consolidation.

The text, structure, and history of Section 652 confirm that Congress intended it to limit the ability of the incumbent LEC and the incumbent cable operator in a given area to combine in order to prevent consolidated control of both wires to a customer's premises.

Congressman Edward Markey, one of the principal authors and negotiators of the 1996 Act, stated during the period leading up to its enactment: "One company should not control both the phone and the cable wire running down the street. The goal of congressional action should be to preserve a two-wire, competitive world."[12] In the years after the 1996 Act was passed, the Commission made similar statements with respect to Section 652's purpose. For example, in a proceeding involving US West, the Cable Services Bureau stated that "the premise of Section 652 is that if *the* LEC and *the* cable operator within its local markets are not owned by one entity ... there is a greater likelihood of competition as envisioned by the 1996 Act."[13] The use of "the" LEC—which, unlike "a" LEC can only refer to the incumbent—leaves no doubt that the Bureau understood the provision to apply only to combinations of incumbent providers. The full

---

12 Edward J. Markey, *Cable Television Regulation: Promoting Competition in a Rapidly Changing World*, 46 FED. COMM. L.J. 1, 6 (1993).

13 *US West, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 4402 ¶ 4 (CSB 1998) ("*US West Extension Order*") (emphasis added).

Commission has also noted that "Congress' main concern in enacting section 652" was to avoid having an ILEC purchase a local cable operator "*and thus control both wires to consumers*."[14]

The text and structure of Section 652 reflect and reinforce its purpose of preventing this limited form of cross-ownership. Section 652(a) prohibits a LEC from acquiring a cable operator only to the extent the cable operator provides services within the LEC's "telephone service area."[15] By definition, "telephone service area" includes only the area within which the LEC provided telephone exchange service as of January 1, 1993.[16] If a CLEC was not providing telephone exchange services as of January 1, 1993—and it is doubtful that any existing CLEC was—then subsection (a) by its terms has no application to a CLEC's acquisition of an overlapping cable system. Section 652(c) likewise prohibits LECs and cable operators from entering into certain joint ventures where their respective "telephone service areas" and franchise

---

14 *Applications of Ameritech, Corp. & SBC Communications, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 14712 ¶ 564 n.1081 (1999) (emphasis added) ("*SBC-Ameritech Order*"); *see also See* Statement of Sen. Bob Kerrey, 141 Cong. Rec. 8134 (June 12, 1995) ("In the managers' amendment offered earlier, the managers changed the regulations as it affects in-area acquisition of cable, which I think is going to be terribly important to maintain a competitive environment. Personally, I believe strongly, at least in the short term, *unless households have two lines coming in – a telephone line and a cable line – it is not likely that you are going to get that kind of competitive situation*.") (emphasis added). *See also* Statement of Sen. Kerrey, 141 Cong. Rec. S7881 (June 7, 1995) ("I have serious problems saying that telephone companies can acquire cable companies inside of their area immediately. Mr. President, I believe *we have to have two lines coming into the home*.) (emphasis added). Senator Kerrey also introduced a letter he received from the State of Wisconsin Department of Justice which stated, in part, that "legislation should continue to prohibit mergers of cable and telephone companies in the same service area. Such a prohibition is essential because local cable companies are the likely competitors of telephone companies. *Permitting such mergers raises the possibility of a 'one-wire world,' with only successful antitrust litigation to prevent it*." 141 Cong. Rec. 8206 (June 13, 1995) (emphasis added).

15 47 U.S.C. § 572(a).

16 *Id.* § 572(e).

areas overlap.[17] Once again, the inclusion of "telephone service area" limits this restriction to joint ventures between cable operators and incumbent LECs. Thus, there is nothing in the text of subsections (a) or (c) of Section 652 that would prevent a CLEC from acquiring or entering into a joint venture with an incumbent cable provider operating within its service area.

Section 652(b), which limits transactions flowing in the opposite direction (*i.e.*, where the cable operator is the acquiring entity), likewise should be read to restrict a cable operator only from acquiring an incumbent LEC (or a CLEC that provided telephone exchange service as of January 1, 1993). Section 652(b) limits the acquisition of a "local exchange carrier" by a cable operator where the LEC provides service "within such cable operator's franchise area."[18] Although Section 652(b) does not refer explicitly to an "incumbent" local exchange carrier or to the target's "telephone service area," there is no reason to believe that Congress intended it to extend beyond the purpose of preventing consolidation of the two wires to a customer's premises.

The history of Section 652 reinforces this interpretation. Section 652 replaced the cross-ownership ban that had been imposed by prior Section 613(b)(1) and was repealed by Section 302 of the Telecommunications Act of 1996.[19] Section 613(b)(1) had prohibited a "common carrier" from providing video programming within its "telephone service area."[20] Although the statute referred to any "common carrier," the Commission limited the cross-ownership ban only

---

17 *Id.* § 572(c).

18 *Id.* § 572(b).

19 *See* S. Rep. No. 104-230, at 171-74.

20 47 U.S.C. § 533(b)(1) (1994) (repealed).

to traditional local exchange carriers that possessed monopoly control over bottleneck facilities.[21] The Commission further recognized that common carriers that "do not provide service by means of such facilities ... do not have 'telephone service areas' within the meaning of the ban and, therefore, are not subject to it."[22] Thus, the Commission's consistent precedent has recognized that Congress's intention of barring cross-ownership between cable operators and LECs is based on concerns about common ownership of the two principal wires to the home.

At a minimum, Section 652(b) is ambiguous with respect to its reach. For example, the statute does not define what it means for a local exchange carrier to be "providing telephone exchange service" within a cable operator's franchise area. This language does not specify whether a LEC must serve existing customers, or simply offer service within its telephone service area. If the latter, the statute contains further ambiguity regarding what it means to provide service within a cable operator's franchise area because CLECs, unlike incumbent LECs, typically are not granted a franchise limited to a defined geographic area within a state. Moreover, the statute does not identify what the relevant time period is for "providing local exchange service," particularly in light of the reality that LECs gain and lose customers on a regular basis. Must the LEC be "providing local exchange service" at the time the application is filed? At the time the application is placed on public notice? At the time of closing? As of January 1, 1993? In light of these ambiguities, the Commission has discretion to adopt a reasonable interpretation of subsection (b) that is consistent with the text, purpose, and structure of Section 652.

---

21 *See* Memorandum Opinion & Order, *In re Application of Teleport Communications -- New York for Transfer of Control of Stations WLU372, WLW316 and WLW317 From Merrill Lynch Group, Inc. to Cox Teleport. Inc.*, 7 FCC Rcd 5986, at ¶ 15 (1992)

22 *Letter Ruling on a Petition for Declaratory Ruling Filed by Twixtel Technologies, Inc.*, 5 FCC Rcd 4547, at 4548 (1990).

Applying Section 652(b) expansively to bar a cable operator's acquisition of a CLEC would not only be at odds with the statute's structure and history, it would also counterproductively hold up plainly pro-competitive transactions.

As an initial matter, such a rule would lead to absurd results because it would permit a CLEC to acquire a cable operator without any special burden, but subject the same cable operator's acquisition of the same CLEC to a presumption of illegality. There is no plausible justification for interpreting a statute in such a manner that two transactions with identical impact on consumer welfare and on the public interest would face such different burdens. Indeed, the happenstance of who acquires whom is unrelated to the actual competitive effects of a transaction and offers easy means of circumvention; for that reason, courts have consistently warned against elevating form over substance.[23]

Moreover, such a rule would bear no connection to the purpose for which Congress enacted the provision. Congress's intent to avoid consolidation of incumbent providers to preserve a "two-wire, competitive world" is not implicated where, as in the case of combinations between CLECs and cable operators, the incumbent LEC would continue to have its own wire to a customer's premises.

The illogic of presumptively barring a cable operator's acquisition of a CLEC is further illustrated by the fact that far more competitively significant transactions face no such hurdle. The Commission's reluctance to rule out Section 652's applicability to CLEC-cable operator transactions means that these transactions will face a higher bar than the industry-transforming

---

23 Courts consistently reject form-over-substance analyses in the antitrust context, properly focusing instead on market and competitive effects. *See, e.g.*, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 772-74 (1984) ("The economic, legal, or other considerations that lead corporate management to choose one [corporate] structure over the other are not relevant to whether the enterprise's conduct seriously threatens competition.").

mergers involving SBC/BellSouth/AT&T and Verizon/MCI. There can be no legitimate justification for such an upside-down regulatory framework.

Accordingly, the best reading of Section 652(b) is that it is simply the mirror image of Section 652(a), targeted at the same class of transactions flowing in reverse.[24] Read as mirror-image provisions, Section 652 does not limit combinations, joint ventures, or any other business relationships between CLECs and cable operators.

B. The Commission Has Previously Indicated That Section 652(b) Is Limited to Transactions Involving Incumbent LECs.

Prior to the Commission's decision to subject the Comcast-CIMCO transaction to Section 652's limitations on cross-ownership, the Commission itself had suggested that Section 652(b) limits only a cable operator's ability to acquire an incumbent LEC. Shortly after Congress enacted the 1996 Act, the Cable Services Bureau in *SouthEast Telephone* was called upon to decide whether a waiver of Section 652 was required for an incumbent cable operator to commence offering local exchange services within its franchise area. The Bureau concluded that no waiver of Section 652 was required, noting in part that SouthEast was "not purchasing or otherwise acquiring an interest in an *incumbent* LEC that provides service in [its] cable franchise area."[25] The Bureau also stated that, "by its terms, [Section 652(b)] applies only to acquisitions of, or joint ventures with, *existing* LECs by cable operators."[26] The Bureau's explicit use of "incumbent" and "existing" indicates its understanding at the time of the 1996 Act that Section 652(b) was intended to target acquisitions and other combinations only with incumbent LECs.

---

24 *See also* 4 ANTITRUST LAWS AND TRADE REGULATION § 64.04 (Matthew Bender, 2d ed.) (referring to Section 652(a) and (b) as "mirror restrictions").

25 *SouthEast Telephone, Ltd.*, Order, 12 FCC Rcd 2561 ¶ 7 (CSB 1996) (emphasis added).

26 *Id.* ¶ 5 (emphasis added).

Furthermore, where the Commission has referred to Section 652(a) and Section 652(b) in relation to each other, the Commission has indicated that the two provisions are mirror images and has not suggested that Section 652(b) is more restrictive.[27] In addressing commenter concerns that the proposed merger of SBC Communications and Ameritech would implicate Section 652, the Commission noted that "Section 652(b) places a *corresponding prohibition* on [acquisitions by] cable operators."[28] Similarly, in *U.S. West*, the Cable Services Bureau described Section 652(b) as a "similar restriction on the ability of a cable operator to acquire" certain interests in a LEC, and referred to Section 652(a), (b), and (c) collectively when describing statutory exceptions, the waiver provision, and the Commission's implementing rules.[29] These statements indicate that the Commission has viewed Section 652 as a restriction on a single type of transaction that may be achieved in multiple ways, not as three independent restrictions reaching three different classes of transactions.

Given the Commission's historical interpretations of Section 652 as applying only to combinations and joint ventures between incumbent LECs and cable operators, it is no surprise that the Commission has approved several CLEC-cable transactions without even mentioning Section 652, let alone requiring a waiver.[30] Moreover, in *SBC-Ameritech* the Commission made clear that a new entrant can compete with an incumbent telecommunications service provider by

---

27 *U.S. West Waiver Order* ¶ 8.

28 *See, e.g., SBC-Ameritech Order* ¶ 563 (emphasis added).

29 *U.S. West Waiver Order* ¶ 8.

30 One example is RCN Cable's acquisition of Con Edison's CLEC in 2006. Shenandoah Telecommunications Company's 2008 acquisition of Rapid Communications likewise resulted in cable-LEC cross ownership. Moreover, as noted above, it appears that the Quadrangle Group acquired overlapping interests in Suddenlink and NTELOS without first obtaining a waiver.

acquiring the facilities of another competitive provider[31]—even though such a transaction had been asserted to implicate Section 652 and could be found subject to its restrictions under the interpretation implicit from the Comcast-CIMCO proceeding.[32] The Commission's willingness to permit an incumbent LEC to acquire a cable overbuilder, notwithstanding Section 652(a), further militates in favor of permitting a cable operator to acquire a CLEC.

This history establishes that any suggestion that Section 652 properly applies to CLEC-cable transactions in light of the Comcast-CIMCO proceeding is in fact inconsistent with the Commission's own historical practices and with the common understanding of the scope of Section 652 in the aftermath of the 1996 Act.

C. A Declaratory Ruling Is Necessary To Define the Proper Scope of Section 652 and Ensure Continued Local Exchange Competition.

The continuing ambiguity about the scope of Section 652 is creating debilitating uncertainty about the extent to which the provision limits transactions between CLECs and cable operators. This uncertainty prevents parties from entering into and pursuing agreements that would result in substantial benefits to consumers and fulfill the 1996 Act's promise of robust competition. NCTA therefore requests that the Commission issue a declaratory ruling clarifying that Section 652 does not restrict transactions between CLECs and cable operators and that, for this limited class of transactions, no waiver is required. The Commission's prompt action on this request will rekindle the prospects for pro-competitive transactions between CLECs and cable operators and ensure a robust market for business local exchange services.

---

31 *SBC-Ameritech Order* ¶ 564.

32 *See id.* ¶ 563 (noting Sprint's contention that "[S]ection 652 bars SBC from acquiring, as part of the merger, any cable systems operated by Ameritech because SBC's telephone service area will include Ameritech's telephone service area after the merger"). The Commission ultimately concluded that Section 652 did not prohibit an ILEC from stepping into the shoes of an incumbent engaging in cable overbuilding. *Id.* ¶ 564.

II. THE COMMISSION MUST, AT A MINIMUM, CONSTRAIN THE ABILITY OF LOCAL FRANCHISING AUTHORITIES TO HOLD UP PRO-COMPETITIVE TRANSACTIONS INDEFINITELY

If the Commission nevertheless determines that Section 652 *does* apply to transactions between CLECs and cable operators, NCTA requests that the Commission grant the accompanying Conditional Petition for Forbearance in which NCTA asks that the Commission forbear from enforcing Section 652 in its entirety in the context of CLEC-cable transactions, or at least to forbear from enforcing the LFA approval requirement contained in Section 652's waiver provision in these circumstances. At an absolute minimum, if the Commission concludes that Section 652 reaches CLEC-cable transactions *and* declines to forbear from enforcing Section 652 in its entirety or the LFA approval requirement, the Commission should establish clear substantive limitations and strict procedural guidelines to govern LFAs' exercise of their approval authority.

Congress specifically authorized the Commission to waive the restrictions in Section 652, thus ensuring that even transactions between two incumbent providers may proceed if they are found to be pro-competitive. However, the Act requires that LFAs also approve any waiver request. The statute does not address what standards or procedures LFAs should follow, in effect allowing LFAs to claim an unrestrained veto right. The statute's silence on what standards or procedures should apply allows the Commission to exercise its discretion to adopt appropriate standards and procedures that promote the public interest and enable a workable, but expeditious LFA review process.[33] There is no legitimate basis for LFAs to have a perpetual right to hold up

---

[33] *Cf. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 385 (1999) (upholding the Commission's rules regarding state review of preexisting interconnection agreements and rural exemptions where "[n]one of the statutory provisions that these rules interpret displaces the Commission's general rulemaking authority," even while acknowledging

a transaction for any reason (or for no reason at all). Indeed, such an unfettered delegation of power to LFAs, with no guiding principles whatsoever, both undermines the Commission's authority to issue waivers consistent with Congress's intent, and likely amounts to an unconstitutional delegation of authority to LFAs and a violation of affected parties' due process rights. NCTA therefore urges the Commission to impose substantive and procedural limits on LFAs in approving waiver requests.

A. The Commission's Authority To Waive Section 652 Is a Central Feature of the Provision.

Section 652's limitations are not absolute. Section 652 does not limit transactions in certain rural[34] and other non-urban[35] areas. Section 652 also does not prevent a LEC from acquiring a cable operator in a small market where the subject cable operator has been competing with another cable operator in the same franchise area since May 1, 1995.[36] For transactions that are covered by the cross-ownership restrictions, the statute includes a waiver provision that is consistent with the statute's animating purpose of preserving and facilitating competition. Section 652(d) authorizes the Commission to waive the cross-ownership restrictions when "the affected cable operator or local exchange carrier would be subjected to undue economic distress by enforcement," when "the system or facilities would not be economically viable if such provisions were enforced," or when "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the

---

that "the 1996 Act entrusts state commissions with the job of approving interconnection agreements . . . and granting exemptions to rural LECs").

34 47 U.S.C. § 572(d)(1).

35 *Id.* § 572(d)(5).

36 *Id.* § 572(d)(3).

needs of the community to be served."[37] Thus, although the 1996 Act imposed restrictions on transactions between LECs and cable operators, Congress took steps to ensure that pro-competitive transactions satisfying specific standards could obtain a waiver from the Commission, even in the case of transactions between two incumbent providers.

B. Section 652's Waiver Provision Is Undermined by the LFA Approval Requirement's Lack of Standards or Time Limits.

Even if the Commission is persuaded that a transaction merits a waiver, the Commission may grant the waiver only if "the local franchising authority approves of such waiver."[38] While the statute provides explicit guidance regarding the *Commission's* evaluation of a waiver request, it contains no substantive standards to inform an LFA's consideration of waiver requests, nor does it impose time limits. The lack of any constraints raises the threat of hold ups or outright denials from LFAs that do not have any legitimate basis to object to the transaction. This unbounded discretion allows an LFA to demand any number of concessions in exchange for approval, whether or not related to the potential competitive effects of the proposed transaction, and the Commission itself has recognized that the risk of indefinite delays could leave a transaction to "languish in regulatory uncertainty."[39] In most transactions, a significant number of LFAs could be required to approve the transaction, exacerbating the uncertainty described above and increasing the risk of unjustified delays. Remarkably, LFAs possess this apparently unbounded authority even though they would not otherwise appear to have regulatory oversight over CLECs or the telecommunications services they provide.

---

37 *Id.* § 572(d)(6)(A).

38 *Id.* § 572(d)(6)(B).

39 Comcast-CIMCO Order ¶ 29.

Although the Commission confronted this concern in the Comcast-CIMCO Order, it ultimately declined to resolve the problem, as it left intact Detroit's purported veto of a pro-competitive and pro-consumer transaction. The Commission was unequivocal in detailing the anticipated benefits of the transaction, concluding that it "will result in significant public interest benefits … because the transaction will foster facilities-based competition in the enterprise market, a long-standing goal of the Commission."[40] The Commission further noted that the combination would bring substantial public interest benefits by facilitating upgrades to the infrastructure serving existing customers, and would increase the overall level of competition and quality of service available to medium-sized and enterprise business customers.[41] The Commission also recognized that Detroit had failed to demonstrate that the transaction would create any competitive harms.[42] Nonetheless, while the Commission laudably took steps to streamline the LFA approval process, it did not alleviate the central hold-up threat.

The fact that an LFA was able to exercise an unqualified right to hold up a transaction found to entail substantial public interest benefits, without offering any evidence that the transaction will harm competition, illustrates precisely why the Commission must clarify that Section 652 is inapplicable to CLEC-cable transactions. The Commission has left in place a regime in which a single LFA, for any reason or for no reason, has the ability to leverage its approval in return for a settlement from affected parties, which will inevitably reduce the efficiencies that would otherwise inure to consumers. And although the Commission granted a waiver with respect to all other franchise areas, parties should not have to carve out particular territories and thereby introduce substantial inefficiencies into the dynamics of a transaction

---

40 *Id.* ¶ 4.

41 *Id.* ¶¶ 38-39.

42 *Id.* ¶¶ 34, 41.

when the Commission has already found that the transaction would serve important public interest goals. In effect, the framework the Commission appears to have endorsed *sub silentio* will directly undermine the public interest.

As long as there is a threat that an LFA may exercise such a veto, CLECs and cable operators will be loath to subject themselves to such burdens and uncertainty by pursuing and entering into these types of transactions and, as a result, consumers will be deprived of the resultant benefits. While most LFAs presumably will act in good faith, some may not, and the need to negotiate a significant number of individual LFA approvals[43] in any event is impracticable. The public interest is not served where companies avoid, abandon, or are compelled to modify strongly pro-competitive transactions, not because of any shortcoming affecting the deal, but because of an uncertain regulatory approval process. These risks undermine Congress's intent in creating the waiver process by discouraging pro-competitive transactions that do not implicate the concerns underlying Section 652 and that would otherwise qualify for a waiver before the Commission has even had an opportunity to evaluate their actual competitive effects.

C. There Is No Legitimate Basis for LFAs To Hold an Indefinite Veto Over CLEC-Cable Transactions.

Furthermore, there is no legitimate basis for giving LFAs an indefinite veto. Although franchising authorities have broad discretion to award franchises and regulate cable systems, LFAs generally have no expertise in regulating the telecommunications services offered by

---

43 For example, the Comcast-CIMCO transaction, which would affect only a limited number of markets primarily in Illinois and Michigan, implicated the approval rights of 274 LFAs. *See* Comcast-CIMCO Order ¶ 29.

LECs,[44] and Congress has placed clear limitations on and established substantive standards for their exercise of their regulatory authority over cable services.[45] For example, the Commission has established substantive requirements to guide LFA approval of transactions involving the transfer of cable systems and requires that these approvals be given within 120 days or an LFA will be deemed to have approved the transaction.[46] An LFA's right to authorize the construction of cable systems over public rights-of-way and through easements is also subject to specific limitations.[47] More broadly, state and local government authority to regulate cable operators and cable systems is preempted when the exercise of such authority would be inconsistent with the Act.[48] There is simply no reason why LFAs should be granted unfettered discretion to approve transactions touching upon telecommunications services that ordinarily are not within their purview, while their ability to exercise their core regulatory functions is circumscribed by standards set forth in the Act and the Commission's rules.

D. The Standardless LFA Approval Requirement Would Be Unconstitutional.

The Commission should interpret Section 652 to prohibit unbounded LFA approval authority in order to avoid two serious constitutional problems.

---

44 *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 As Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 ¶¶ 121-22 (2007) ("We clarify that LFAs' jurisdiction applies only to the provision of cable services over cable systems. ... We further clarify that an LFA may not use its video franchising authority to attempt to regulate a LEC's entire network beyond the provision of cable services."); *see also Alliance for Community Media v. FCC*, 529 F.3d 763, 882-73 (6th Cir. 2008) (rejecting challenges to the Commission's clarifications).

45 *See generally* 47 U.S.C. § 541.

46 *Id.* § 537.

47 *Id.* § 541(a)(2).

48 *See id.* § 556.

First, an unbounded LFA approval requirement would amount to an unconstitutional delegation of legislative power by Congress. The Constitution requires Congress, in exercising its Article I legislative power, to "lay down by legislative act an *intelligible principle* to which the person or body authorized to [act] is directed to conform."[49] Whatever the contours of the non-delegation doctrine as a matter of modern constitutional law, there has never been any question that a statute that provides "literally no guidance for the exercise of discretion" is the epitome of a statute that runs afoul of the non-delegation doctrine.[50]

Broad delegations of authority are permitted under the non-delegation doctrine only to the extent the authority can be meaningfully interpreted and implemented as part of a larger statutory scheme that conveys an apparent national purpose.[51] Notably, the Commission's "public interest" authority, which is at the outer limit of permissible delegation, is part of a regulatory framework that informs the meaning of that standard. For example, in the broadcast context, the "public interest" has been defined to include considerations of competition, localism, and diversity. Delegations of authority to private boards also raise particular concerns under the

---

49 *Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457, 472 (2001) (emphasis added) (internal quotation marks and citation omitted).

50 *Id.* at 474 (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (striking down a statute authorizing the President to restrict the petroleum market where there was "no criterion to govern the President's course").

51 *See, e.g.*, *National Broadcasting Co. v. United States*, 319 U.S. 190, 214-15 (1943) (approving the FCC's power to grant broadcast licenses "as public convenience, interest, or necessity requires"); *Am. Power & Light, Co. v. SEC*, 329 U.S. 90, 105 (1946) ("[I]t then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."); *see also* 47 U.S.C. § 624 ("Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this title.").

non-delegation doctrine because a lack of standards provides opportunities for abuse of this approval power.[52]

Second, the Commission's enforcement of an unbounded LFA approval requirement also would violate fundamental principles of due process. Due process requires, at a minimum, that the government put individuals on notice of what standards and rules govern their actions. A company subject to regulation must be "able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform."[53] The application of defined standards also notifies parties to an agency proceeding *in advance* what legal issues and factual questions the agency will address so that they may supply appropriate supporting or rebutting information.[54] Moreover, due process requires that *some* limitations apply to government authority lest it be entirely capricious and dictatorial. Courts have consistently held that unbridled discretion with no substantive constraints is an "intolerable invitation to abuse."[55]

---

52 *See* ADMINISTRATIVE LAW § 1.3.2 (Alfred C. Aman, Jr. & William T. Mayton eds., 2d ed., 2001).

53 *ICO Global Commc'ns (Holdings) Ltd. v. FCC*, 428 F.3d 264, 268 (D.C. Cir. 2005); *see also Hill v. Fed. Power Comm'n*, 335 F.2d 355, 362 (5th Cir. 1964) (reversing an agency decision on due process grounds where "the standards to be applied were neither evolved nor announced until the decision holding them unsatisfied.").

54 *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4 (1974) ("A party is entitled ... to know the issues on which decision will turn and to be apprised of the factual materials on which the agency relies for decision so that he may rebut it."); *Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 63 (D.C. Cir. 1999) (finding that FERC acted improperly by modifying the applicable standards without forewarning the parties); *see also Whisenhunt v. Spradlin*, 464 U.S. 965, 969 (1983) (Brennan, J., dissenting) ("By demanding that government articulate its aims with a reasonable degree of clarity, the Due Process Clause ensures that state power will be exercised only on behalf of policies reflecting a conscious choice among competing social values; reduces the danger of caprice and discrimination in the administration of the laws; and permits meaningful judicial review of state actions.").

55 *Holmes v. N.Y. City Housing Auth.*, 398 F.2d 262, 265 (2d Cir. 1968).

The Commission's enforcement of an unbounded LFA approval requirement would not provide any notice to parties of what substantive standards will apply to waiver requests that must be approved by LFAs. And the enforcement of the LFA approval requirement, without any limits on LFAs' discretion, would invite entirely arbitrary and unprincipled government action. Moreover, because Section 652 does not require LFAs to state *any* basis for their decision to approve or disapprove of a transaction, it denies reviewing courts a record upon which to ensure that the withholding of LFA approval was lawful.[56]

In order to save Section 652 from serious constitutional infirmities under established non-delegation and due process principles, the Commission should interpret the statute in a manner that constrains LFAs' exercise of their authority to approve or reject waiver requests under Section 652 consistent with the statutory limitations that Congress placed on the Commission's discretion (if it does not eliminate the cross-ownership restriction altogether).[57] Thus, an LFA's decision to grant or reject a request to waive the restrictions of Section 652 must derive from its assessment of the economic distress that would otherwise result from enforcement of the restrictions, the economic viability of providing the applicable services if the restrictions are enforced, and the competitive and public interest effects that may be undermined by enforcement of the provision.[58] The Commission should also limit the time during which LFAs are allowed to respond to waiver requests to avoid a protracted process that effectively stymies pro-

---

56 *U.S. Telecom Ass'n v. FCC*, 227 F.3d 450, 460 (D.C. Cir. 2000) ("It is well-established that an agency must cogently explain why it has exercised its discretion in a given manner and that explanation must be sufficient to enable us to conclude that the [agency's action] was the product of reasoned decisionmaking.") (internal quotation omitted).

57 *See generally* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000) (arguing that the non-delegation doctrine is used as a canon of construction to limit an agency's role in exercising its delegated authority).

58 47 U.S.C. § 572(d)(6)(A)(i-iii).

competitive transactions that would otherwise bring significant benefits to the market and to consumers.[59] The Commission in its Comcast-CIMCO public notice imposed a 60-day limit,[60] which allows LFAs ample time to respond to requests without indefinitely holding up transactions.

---

[59] *See Alliance for Community Media*, 529 F.3d at 772-73, 780 (upholding the Commission's authority to interpret provisions of the Act and to establish of time limitations for LFA deliberations).

[60] *See* Comcast-CIMCO Order ¶ 15.

CONCLUSION

For the foregoing reasons, NCTA respectfully requests that the Commission issue a declaratory ruling clarifying that Section 652 of the Act does not restrict transactions between CLECs and cable operators and that, for this class of transactions, no waiver of Section 652 is required. In the alternative, as described in the concurrently filed Conditional Petition for Forbearance, NCTA requests forbearance from Section 652 in its entirety in the context of CLEC-cable transactions, or at least forbearance from the LFA approval requirement contained in Section 652's waiver provision. Finally, if the Commission deems Section 652 to restrict transactions between CLECs and cable operators and denies the Conditional Petition for Forbearance, NCTA requests that the Commission establish clear governing standards and strict time limits as described above to facilitate expeditious consideration of waiver requests.

Respectfully submitted,

Neal M. Goldberg

Rick Chessen
Neal M. Goldberg
Steven F. Morris
National Cable & Telecommunications Association
25 Massachusetts Avenue, N.W. – Suite 100
Washington, D.C. 20001-1431
(202) 222-2445

June 21, 2011